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Case No.

Supreme Court of the United States

October Term - 1983

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED,

HENRY CARPENTER,

Representative Member,

Plaintiffs-Respondents

v.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN,

Defendant-Appellant.

On Appeal from the Appellate Court of Wisconsin (District II); on petition for review to the Supreme Court of Wisconsin.

Petition for Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. CAN A SECTION 893.80 WISCONSIN STATUTES NOTICE BE SUFFICIENT IF IT PRESENTS A CLASS CLAIM WITHOUT SEPARATELY IDENTIFYING EACH MEMBER OF THE CLASS AND SHOWING THAT THE MULTIPLE CLAIM IS BEING MADE BY THEIR AUTHORITY?

II. DOES DENIAL OF GARBAGE COLLECTION TO MEMBERS OF SAME CLASS CONSTITUTE AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE LAW?

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TABLE OF AUTHORITIES

I. Cases Cited:

1. Goldstein v. City of Chicago, 504 F. 2d 989, (CA, 1974).

2. Hicks v. Milwaukee County, 71 Wis. 2d 401, 238 N.W. 2d 509 (1976).

3. Mercury Records v. Economic Consultants, 91 Wis. 2d 482, 283 N.W. 2d 613 (1979).

4. Shorehaven, a Limited Partnership, v. Commissioner of Public Works of the City of Racine, Case No. 74-531-CI.

OFFICIAL AND UNOFFICIAL REPORTS

Carpenter v. Racine Commissioner of Public Works, 115 Wis. 2d 211.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION OF THE U.S. SUPREME COURT

The judgment sought to be reviewed is the Denial of Petition for review entered by the Supreme Court of Wisconsin on November 8, 1983.

The statutory provision believed to confer jurisdiction to review is 28 U.S.C.A Section 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES VERBATIM WITH APPROPRIATE CITATIONS

Section 895.45, Wisconsin Statutes (1977), provides:

(1) No civil action or civil proceeding may be brought against any state officer, employee or agent for or on account of any act growing out of or committed in the course of the discharge of such officer's, employee's or agent's duties, unless within 90 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employee or agent involved.

(2) In this section, "claimant" means the person or entity sustaining the damage or injury or his agent, attorney or personal representative.

(3) The notice under sub. (1) shall be sworn to by the claimant and shall be served upon the attorney general at his office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice.

(4) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employee or agent shall not exceed $100,000. No punitive damages may be allowed or recoverable in any such action.

Section 895.43, Wisconsin Statutes has been renumbered as section 893.80, Wisconsin Statutes, which reads in pertinent part:

(1) No action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant

shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudical to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant fire company, cor-

poration, subdivision or agency nor against any defendant officer, official, agent or employee, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

United States Constitution, Article XIV, Section 1,:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On December 19, 1979 a Notice of Claim against the City of Racine was served. (Appendix p. A38) The notice informed the City that Henry Carpenter and other members of the class of parties having five unit or larger apartment buildings constructed on or after 1963 were making claim against the City.

The City of Racine subsequently denied the payment of the claim and action was commenced on August 22, 1980. The claim alleged the City's Commissioner of Public Works had violated the equal protection clause of the United States Constitution and comparable State constitutional provisions by arbitrarily denying garbage pick-up to some multi-family dwellings and picking up the garbage at other multi-family dwellings. Damages were claimed at $1,179,657.00.

The City moved the Court to decertify the class. On August 12, 1982 a hearing was

held on the City's motion to decertify the class. No testimony was offered at the hearing by the City. Judge Dennis Flynn determined that there were numerous members in the class, that they shared a common interest, that the plaintiff, Henry Carpenter, was a representative member and could protect the interests of the class, and it would be impractical to bring all members before the Court. The Court specifically stated, "In other words there were 2,065 units of residential buildings which contained five or more dwelling units which were not provided with solid waste collection." (Appendix p. A25)

Shorehaven v. The Commissioner of Public Works for the City of Racine, Case No. 74-531. (Appendix p. A36)

The trial commenced on August 18, 1982. The evidence at trial established some 5,351 total units (in five unit or more apartment buildings). The City admitted, from time to

time, that somewhere between 873 to 3,543 units were getting pick-up service and that in 1972 some 1,808 units were denied service and that in 1976 and at the time of trial some 2,065 units were denied service. The Commissioner arbitrarily denied service to some buildings simply because the buildings were constructed after 1962.

The City argued they did not have notice of the claim. Judge Thomas Corbett's decision in the Shorehaven case dated October 29, 1978 (Appendix p. A36) was used to establish the knowledge of all the details concerning the same issue and that the Court had declared it a violation of constitutional rights. The decision was all that was available because almost all of the file had been lost. The decision contained reference to detailed numbers known to and admitted by the City. The Court admitted the decision. The trial Court heard arguments on relevancy of the decision and allowed it to be used.

During the trial, evidence showed that garbage pick-up became a "nightmare" (the Commissioner's own word) to administer. This was shown to be a direct result of the Commissioner's arbitrary decision-making from 1963 through January 27, 1972.

But based upon great savings in manpower and equipment due to the combining of trash and rubbish collection in 1971, the Commissioner suggested expansion of services to container service and recommended an end to arbitrary and inconsistent collection practices. But before the City acted on the Commissioner's recommendations Shorehaven Apartments served a Writ of Mandamus on the Commissioner. At this point in time the Commissioner set off on a course of conduct to evade the ramifications of this lawsuit.

In 1978 the City amends its ordinance and reverses its direction to now terminate all pick-up to multi-family units. In October, 1978 Judge Corbett's decision

orders an end to the unequal treatment but Shorehaven takes no action because with the Ordinance now changed they have no basis to claim unequal treatment.

At this point all would have been calm had the Commissioner simply complied with the City Ordinance. He did not. He continued the unequal treatment.

Carpenter filed a demand for pick-up. The class action was commenced. Several legal battles were fought and not until after March of 1982 did garbage pick-up become uniform in the City of Racine for multi-family units of five or more, thus finally ending twenty years of continuous illegal discrimination.

STAGE IN PROCEEDINGS WHERE FEDERAL QUESTIONS RAISED - MANNER OF RAISING - WAY PASSED UPON BY COURT

I. CAN A SECTION 893.80 WISCONSIN STATUTES NOTICE BE SUFFICIENT IF IT PRESENTS A CLASS CLAIM WITHOUT SEPARATELY IDENTIFYING EACH MEMBER OF THE CLASS AND SHOWING THAT THE MULTIPLE CLAIM IS BEING MADE BY THEIR AUTHORITY?

Raised - Motion for Decertification of Class

Denied - Judge Flynn Order, (Appendix p. A25)

Appealed - Appealed to Appellate Court of Wisconsin on April 15, 1983 by defendant - appellant

Court of Appeals found, (Appendix p. A1)

-That Section 893.80 Stats. requires notice of claim within

120 days.

-That Hicks v. Milwaukee County, 71 Wis. 2d 401, 238 N.W. 2d 509 (1976), applied this Notice requirement to Class Action Suits.

-That applying Hicks rationale to Carpenter (case at bar), Carpenter's Notice failed to identify his fellow claimants, nor show he was authorized to act on their behalf and thus rules it insufficient.

-Court disregarded factual dissimilarities between Hicks and Carpenter cases.

-Court disregarded Section 893.80 Stats. actual notice exception to 120 day notice.

-Court found Section 893.80 Stats. Notice sufficient as to individual claim.

Wisconsin Supreme Court denied petition

for review on November 8, 1983.

(Appendix p. A35)

II. DOES DENIAL OF GARBAGE COLLECTION TO MEMBERS OF SAME CLASS CONSTITUTE AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE LAWS?

Raised - Summons and Complaint

Denied - Answer

Judgment - Trial court affirmed unconstitutional denial of equal protection.

Appeal - Wisconsin Appellate Court reverses trial court.

Petition for Review - Wisconsin Supreme Court refuses to hear Petition for review.

ARGUMENT FOR ALLOWANCE OF WRIT OF CERTIORARI NOTICE-SECTION 893.80 WISCONSIN STATUTES

I. 1. The Supreme Court of the United States should clarify Hicks v. Milwaukee County and not apply its narrow test to Carpenter to avoid a denial of equal protection of the laws. In Hicks, the Supreme Court clearly stated that it was an "exception". Hicks stated that a class action will not normally be subject to a successful motion to dismiss simply because all class members have not been identified at the time of the filing of the action. Obviously, this was based on the fact that a significant underlying reason for class actions is to permit the filing of the action after the initial group of class members have been identified and then to learn the identity of the remaining class members through mandatory discovery procedures which

may only be fully utilized in Wisconsin after legal action has been commenced.

Nevertheless, the Hicks court dismissed the class action. In so doing, the Court failed to recognize and address significant distinctions between Hicks and Carpenter; i.e., Hicks sought a money judgment only - Carpenter sought mandamus relief - the controlling statute in Hicks was not the same as the statute in Carpenter - in Hicks the county had no knowledge of the potential claim before the action was filed - in Carpenter the city had actual knowledge before the action was filed through the Shorehaven decision and it even knew the actual number of dwelling units involved.

To hold otherwise would pose a "Catch 22" problem which would make a class action against a municipality a practical impossibility.

Hicks, then, was decided as an exception to the basic rule in class actions in a very

particular fact situation and should be narrowly applied by the Supreme Court.

Use of the term "every person" in Hicks does not mean that the name of every person in a class must be supplied to the municipality before a valid class action can be maintained. Rather, it means that every person who actually, directly brings suit against a municipality must be identified. Here, since plaintiff, Henry Carpenter, is actually bringing the suit and is personally identified and is said to bring the action on behalf of other class members, the "every person" requirement is met.

It should be noted that Section 895.45, Wisconsin Statutes, supra p. 5, does require the "names of persons involved"; whereas Section 893.80, supra p. 5, does not. This Notice in Carpenter was filed pursuant to Section 893.80.

In fact, to interpret Section 893.80, Stats., so as to require identifying all

class members before an action can be filed against a municipality is in itself an unconstitutional discrimination since class actions could then be filed against anyone else without such advance notice being required but could only be filed against a municipality after all class members were specifically identified. No rational basis would seem to exist for such a legal distinction.

The class action is a major vehicle in American jurisprudence for protecting the right of individual small litigants who have substantial collective rights. Thus, a city is a valid defendant in a class action as it is a large corporate entity made up of tens of thousands of individuals and families.

Mercury Records was decided five years after Hicks and again sets forth the continuing basic proposition of the earlier cases, to which Hicks was admitted to be an exception, indicating that public policy

favors the class action. Thus, procedural technicalities which mitigate against the bringing of class actions are to be narrowly construed.

2. The Court of Appeals completely overlooked the remaining language in Section 893.80, Stats., which states that where the municipality was on actual notice and was not prejudiced, then the failure to fully comply with the technicalities of the notice statute do not bar court action.

A. The case of Shorehaven v. Commissioner of Public Works (Appendix pp. A36) was filed in 1974 and decided by the Hon. Thomas P. Corbett on October 29, 1979. Shorehaven clearly indicated that the same practices of the same Commissioner of Public Works, Fred Larson, constituted an unconstitutional denial of equal protection of the law. Thus, probably from the filing date of Shorehaven and certainly from its decision date, the Commissioner of Public Works and

the City of Racine were clearly on actual notice that their practices were in violation of the law. Further, the Shorehaven decision quoted information contained in reports from the Commissioner of Public Works to the Common Council of the City of Racine which proved that the City actually knew the exact number of units in the Class.

B. In his 1972 report to the Common Council the Public Works Commissioner admitted that his decisions in determining whose refuse would be picked up and whose would not were "arbitrary". Thus, the Commissioner of Public Works personally and the City through the knowledge of its Commissioner of Public Works were definitely on actual notice and admitted that their practices in this regard were arbitrary.

C. The City moved in Circuit Court to decertify the class in Carpenter. The Hon. Dennis J. Flynn found that the City

knew or should have known the size of the Class. Thus, Judge Flynn determined that the City was on actual notice. (Appendix pp. A25)

D. On the date the City received notice from the class representative it knew the extent of the Class claim because its own records indicated the number of separate buildings containing five or more units whose refuse was not being picked up.

E. There was no prejudice to the City in Carpenter. The City vigorously defended against the action at all stages thereof and over a substantial period of time. They made several motions in court, defended against motions, etc. They were clearly aware, as specified in (A) above of the size of the class and potential monetary exposure in this case and took all the necessary legal defense steps which could have been taken. In short, had the City known the exact name of every class member

at the time of the filing of the notice in this case, they would have proceeded no differently.

EQUAL PROTECTION

II. 1. The Wisconsin Appellate Court misread the facts in Carpenter to involve owners of FIVE UNITS OR MORE buildings vs. owners of FOUR UNITS OR LESS buildings; instead of owners of FIVE UNITS OR MORE vs. other owners of FIVE UNITS OR MORE.

There was no rational basis here such as would support even the lesser constitutional standard held to apply to the City by the Appellate Court. Rather, a simple "time line" was drawn between the end of 1962 and the beginning of 1963. This "time line" had absolutely nothing to do with refuse pick-up.

The day on which apartment buildings are completed has absolutely nothing at all to do with the who, what, where, how, when or

why of garbage collection. In fact, based on the local municipal ordinances, garbage must be transported to the curbside before it will be collected. Thus, garbage collection occurs totally outside of the buildings themselves and the construction date of the buildings is totally unrelated.

Clearly, the date on which an apartment building is constructed is not "rationally related to legitimate public purpose" in any way which involves refuse collection.

By incorrectly focusing on distinctions between buildings containing five or more or four or less units which was not at all the basis of the discrimination in Carpenter, the Appellate Court's attention was diverted from the real issue in Carpenter. That issue was that the City, by its own written admissions, arbitrarily drew a mere time line on a calendar and improperly and illegally discriminated between owners of buildings all having five or more units

depending upon simply the date when the building was completed. This time line, then, which simply separated the end of 1962 from the beginning of 1963 was in no way rationally related to refuse pick-up and could not constitute a rational constitutional basis for such an important discrimination regarding the granting or denial of a free city service between persons who all paid the same taxes.

Thus, the Appellate Court erred in finding a rational basis for the City ordinances.

2. The Court of Appeals ignored the admission by the City of its arbitrary decisions in 1972 and 1976.

A. In a letter and report from the Commissioner of Public Works to the Common Council it is stated in both 1972 and 1976 that the Commissioner's decisions on garbage collection were "arbitrary" and "lacked uniformity".

B. The Court of Appeals ignored the admissions by the City in its 1972 and 1976 reports in which the extent of denial of garbage collection to buildings containing five or more units was specifically set forth.

C. The Appellate Court did not take into consideration that the Shorehaven case was decided by Judge Thomas Corbett and gave actual notice to the Commissioner of Public Works (the Defendant) and the City that their garbage collection practices were unconstitutionally discriminatory.

D. The Appellate Court opinion states that it was the City's intent to eventually provide equal enforcement of its refuse pick-up rules. The facts, however, clearly show otherwise. This discrimination began in 1963 and was documented in detail in both the 1972 and 1976 reports of the Commissioner of Public Works to the Common Council. In fact, this blatant discrimina-

tion did not end, suspiciously, until just before the Carpenter case went to trial. To believe that a period of almost two decades was in any way a reasonable period during which to effect equal enforcement is patently ludicrous. Prior to the changing in 1978 the City ordinance directed all five or more unit dwellings were to receive pick-up. After the 1978 amendment the ordinance directed all pick-up to be discontinued.

Unequal collection continued from 1963 through 1982. The Commissioner did not follow the ordinance before or after its Amendment in 1978 until shortly before trial.

CONCLUSION

The plaintiffs-respondents feel that a review by the Supreme Court of the United States is necessary to correct the obvious error in that the unequal treatment occurred within one class, contrary to the Appellate

Court's erroneous thinking that the unequal treatment was between two different classes.

Also, the Supreme Court of the United States needs to reverse the requirement found in Hicks and Carpenter requiring that each and every class member in a class action suit give notice of their individual claim prior to commencement of suit and not apply this fatal requirement to future class action cases.

APPENDIX

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COURT OF APPEALS
DECISION DATED AND
RELEASED SEP 26 1983

No. 83-100

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED:

HENRY CARPENTER,
Representative Member,

Plaintiffs-Respondents,

v.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN

Defendant-Appellant

APPEAL from a judgment of the circuit court for Racine County: EMMANUEL J.

VUVUNAS, Judge. Reversed and remanded.

Before Scott, C.J., Voss, P.J., and Robert W. Hansen, Reserve Judge.

SCOTT, C.J. This is an appeal from a judgment resulting from a class action suit finding that the Commissioner of Public Works for the City of Racine discriminated against various owners and lessors of multiple family residential buildings in the collection of solid waste. The issues on appeal in this case are many. As to the class, however, compliance with the notice of claim requirement of sec. 893.80, Stats., is dispositive. Because only Henry Carpenter satisfied the statutory notice requirements, we must reverse the order denying the defendant's motion to decertify the class. As to Carpenter's suit, because we conclude there was no denial of his right of equal protection, we also reverse the trial court's denial of the defendant's motion for a directed verdict.

In 1963, due to a lack of appropriations from the city council, Fred Larson, the Racine Commissioner of Public Works, decided not to provide solid waste collection services to buildings constructed during or after 1963 which contained five or more dwelling units per building. In 1976, the City of Racine, pursuant to Larson's direction, stopped solid waste collection at Carpenter's apartment building which contained eight dwelling units. Carpenter procurred the services of a commercial waste collection service beginning in March of 1976. In early 1978, the Racine common council passed an ordinance which provided that no building containing five or more dwelling units would receive solid waste collection services.

On December 14, 1979, Carpenter presented a notice of claim to the city of Racine in the care of Anthony J. Schleffer, City Clerk. The notice of claim referred to

Carpenter personally as a claimant and as a representative member of a class of parties having apartment buildings of five units or more. In August 1980, Carpenter filed suit personally and as representative member of the class. The defendant's motion to decertify the class was denied by the trial court.

A jury trial was held on August 8, 1982. The defendant moved for a directed verdict at the end of plaintiffs' case on the grounds that there was no denial of equal protection. The trial court denied this motion. A special verdict was returned awarding the class $764,612 in damages.

The Commissioner of Public Works contends on appeal that certification of the class was improper because the class members, other than Carpenter, failed to file the requisite notice of claims under sec. 895.45, Stats. (1977).[1] He also argues that the trial court should have granted the defendant's motion for a directed verdict

because there was no denial of Carpenter's constitutional right to equal protection as a matter of law. We agree.

Section 895.43, Stats. (1977)[2] requires that no action be brought or maintained against a governmental body or agency unless the claimant has filed a notice of claim as a step towards the recovery of a monetary claim. Rabe v. Outagamie County, 72 Wis.2d 492, 497, 241 N.W.2d 428, 431 (1976); Kaiser v. City of Mauston, 99 Wis.2d 345, 356, 299 N.W.2d 259, 266 (Ct.App. 1980). In Hicks v. Milwaukee County, 71 Wis.2d 401, 238 N.W.2d 509 (1976), the supreme court applied this notice requirement to class action suits against a governmental body. In Hicks, a Huber prisoner sued Milwaukee County on behalf of himself and all similarly situated prisoners based upon a theory that the county's practice of overcharging prisoners resulted in unjust enrichment. The plaintiff filed a notice of claim against the county on behalf of him-

self and all members of the class. In dismissing the class action, the court held that "[e]very person making a claim against a county must state the nature of the claim and the facts upon which it was founded in writing." Id. at 407, 238 N.W.2d at 513. The court further stated that a document presenting multiple claims against a county must, at the minimum, identify the claimants and show that the claims are being made by their authority. Id.

Using the guidelines and rationale set down in Hicks, the plaintiffs' class action suit must fail. The notice of claim filed by Carpenter on December 14, 1979 does not meet the minimum standard for asserting claims against a governmental entity by a member of a class. Carpenter's notice of claim does not identify his fellow claimants, nor does it show that Carpenter is authorized to act on their behalf.

The respondent attempts to

distinguish Hicks by pointing out factual dissimilarities between the cases. We find no legal significance in these differences. We conclude it is a logical extension of Hicks to apply the notice of claim requirements to the class action in the present case.

Although the notice of claim is inadequate as to the class, it appears to be sufficient as to Carpenter's action individually. We, therefore, must consider the merits of the case as to Carpenter's claim.

At the close of the plaintiffs' case, the defendant moved for a directed verdict on the grounds that, as a matter of law, the Commissioner's actions regarding the suspension of garbage collection did not violate the constitutional right to equal protection. It is the duty of the trial court to decide constitutional issues as a matter of law.[3] Just v. Marinette County, 56 Wis.2d 7, 24-25, 201 N.W.2d 761, 771-72 (1972); Weber v. State, 59 Wis.2d 371, 381,

208 N.W.2d 396, 401 (1973). Because we find there was a rational basis for the Commissioner's action and no evidence that Carpenter was the victim of intentional, systematic or arbitrary discrimination, we conclude that the trial court erred when it denied the defendant's motion for a directed verdict.

In deciding whether Carpenter was denied equal protection of the laws, we must determine by what constitutional standard the actions of the Commissioner of Public Works should be tested. Initially, we must consider the case to determine whether multiple dwelling units are a suspect classification or garbage collection is a fundamental right. If a fundamental right or suspect classification is involved, the action will be subjected to a strict scrutiny and will survive an equal protection challenge only if it serves an important governmental objective that could not be

accomplished through less burdensome means. O'Connell v. Kniskern, 484 F. Supp. 896, 898 (E.D. Wis. 1980), cert. denied, 454 U.S. 1084 (1981).

Suspect classifications identified by the Supreme Court are race, national origin, alienage, indigency or illegitimacy. San Antonio School District v. Rodriguez, 411 U.S. 1, 61 (1973) (Stewart, J., concurring); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Multiple dwelling units is not an identified suspect classification. A fundamental right is a right which is explicitly or implicitly guaranteed by the constitution. San Antonio School District, 411 U.S. at 33 (held education was not a fundamental right); Dandridge v. Williams, 397 U.S. 471 (1970) (held housing as welfare benefit was not a fundamental right). Garbage collection is neither an explicitly nor an implicitly guaranteed constitutional right. Goldstein v. City of

Chicago, 504 F.2d 989, 991-92 (7th Cir. 1974).

Since garbage collection is not a fundamental right and multiple dwelling ownership is not a suspect classification, the applicable test is whether the Commissioner's action in distinguishing between owners of buildings with five dwelling units or more and those buildings with less than five dwelling units was rationally related to a legitimate public interest. Id. at 992. Based upon a similar factual situation, the Seventh Circuit in Goldstein found that distinguishing between different types of multiple dwelling residential structures in order to provide efficient sanitation for the community was reasonable. Likewise, we find that the Commissioner's decision to restrict public garbage collection to multiple dwellings of less than five units is reasonable. The action bears a rational relationship to the city's legiti-

mate public interest in providing efficient sanitation to the community as a whole.

Carpenter argues that discrimination occurred within the class of owners of housing units with five or more dwelling units because of unequal enforcement of the Commissioner's order. While this court recognizes that there is sufficient evidence to show such unequal enforcement did occur, in and of itself, it is insufficient to classify the Commissioner's acts as unconstitutional. State ex rel Cities Service Oil Co. v. Board of Appeals, 21 Wis.2d 516, 544, 124 N.W.2d 809, 823 (1963). There must be a showing of an intentional, systematic and arbitrary discrimination. Village of Menomonee Falls v. Michelson, 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (Ct. Appl. 1981). Carpenter made no such showing in this case. Simply that enforcement occurs selectively over a period of time does not constitute a constitutional viola-

tion unless there is no intention to follow it up by general enforcement against others. Village of Menomonee Falls, at 146, 311 N.W.2d at 663, citing People v. Utica Daw's Drug Co., 16 App. Div.2d 12, 21, 225 N.Y.S.2d 128, 136, 4 A.L.R.3rd 393, 402 (1962). It was the intent of both the Commissioner of Public Works and the Common Council of Racine to have equal enforcement. Equal enforcement, in fact, occurred by the spring of 1982.

We hold that because all class members except Carpenter failed to properly file notice of their claims to the Commissioner of Public Works, the defendant's motion to decertify the class should have been granted. As to Carpenter, while notice of claim was filed, there was no denial of equal protection because there was a rational basis for the Commissioner's action, and inadvertent unequal enforcement is not sufficient to show a denial of equal

protection.

By the Court.--Judgment reversed and remanded.

Not recommended for publication in the official reports.

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED,

HENRY CARPENTER, Representative Member,

Plaintiffs

-vs-

COMMISSIONER OF PUBLIC WORKS, City of Racine, Wisconsin,

Defendant.

JUDGMENT

Case No. 80-CV-1221

The above entitled action having coming on for trial on August 18 and August 19, 1982, WILLIAM R. BINETTI, JOHN J. WARGO

and MATTHEW H. QUINN appearing for plaintiffs, and DANIEL P. WRIGHT appearing for the defendant; and the case having been tried before the Court and a jury; and the jury having rendered its verdict dated August 19, 1982, which is on file herein; and the jury having awarded plaintiffs the sum of $764,612.00 as damages; and the Court having entered on Decision of Motions after Verdict entered December 14, 1982, and an Order for Judgment on December 15th, 1982, granting plaintiffs' motion for judgment on the verdict in favor of themselves and against the defendant, Commissioner of Public Works, City of Racine, Wisconsin, together with costs, disbursements and attorney fees,

NOW, THEREFORE, on Motion of William R. Binetti, one of the attorneys for plaintiffs;

IT IS ADJUDGED that the plaintiffs have and recover of the defendant,

Commissioner of Public Works of the City of Racine, Wisconsin, the sum of SEVEN HUNDRED SIXTY FOUR THOUSAND SIX HUNDRED TWELVE DOLLARS, ($764,612.00), together with costs, disbursements and interest in this action. That said amount shall be placed in a fund pending allocation to the parties to whom it is owed as hereinafter provided.

IT IS ADJUDGED that one/third of said fund shall be paid forthwith to WILLIAM R. BINETTI, JOHN J. WARGO and MATTHEW H. QUINN, as attorneys fees in this action.

IT IS ADJUDGED that the plaintiffs' attorneys shall run notices in the newspapers setting out the class requirements to inform class members of their right to file claims against the balance of the class action fund. That a date will be set ninety days from the date of filing of the notices as a final date for the filing of claims and will allow recovery to each party claimant in the amount due them, minus the propor-

tional amount of attorney fees from said class action fund.

IT IS ADJUDGED that Court Commissioner James Drummond is hereby appointed to act for the Court in setting up the above-stated procedures and to hear any disputed claims that may arise. Said Court Commissioner shall be compensated for his time in this matter at the rate of $50.00 per hour from the class action fund before any residual amount is turned over to the City.

FINALLY, IT IS ADJUDGED that all the claims be paid in full in the manner stated above. If the fund exceeds the amount of claims and fees as above stated, the balance shall be turned over to the City. If the amount of the fund does not meet the levels of claims, each claim shall be reduced proportionately and each claimant shall receive a reduced proportional share.

Dated this 15th day of

December, 1982.

BY THE COURT:

/s/ Claudette Woods
Clerk of Courts

STATE OF WISCONSIN

CIRCUIT COURT BRANCH IV

RACINE COUNTY

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED

HENRY CARPENTER, Representative member,

Plaintiffs,

-vs-

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN,

Defendant.

DECISION ON MOTIONS AFTER VERDICT

80-F-1221

The Court, after having heard the arguments of counsel, having had a chance to go over the exhibits and the file in this matter, finds as follows with reference to

the defendant's motions after verdict:

1. Denies Motion #1 and finds as a matter of law that there was sufficient credible evidence in the testimony to sustain the findings that the defendant's actions constituted denial of equal protection under the laws.

2. Denies Motion #2 as to question #2 of the verdict form and finds that there was, as a matter of law, evidence sufficient to sustain the answer of the jury.

3. As to the question of the award, finds that the award was not excessive and was not due to perversity, prejudice, or other error committed during the trial.

4. As to Motion #4 of the defendant, the Court denies that motion and reaffirms the ruling that it made during the trial that the Commissioner was not acting in a personal capacity and that this defense was not available to him.

5. The Court having reviewed the

motion #5 of the granting of a new trial, denies the motion and further states that the reasons for denying the particular matters brought up by the defendant in allegations A through G were addressed at the trial fully, and the Court reaffirms its previous rulings.

As to allegation H, that the Court committed error in answering the question of the jury, the Court only wishes to state that both attorneys were contacted, both were party to a conference call in which the question of the jury was read to them and an answer was indicated and agreed to by all parties. Further, that the Court stated to both parties that if they wished to come to the courtroom and make arguments on the record about the answer the Court would be willing to hear them, but both parties agreed and stipulated to the answer that went to the jury.

6. The Court denies Motion #6 and

finds that Section 893.80 is not applicable, an action such as this seeking redress for a violation of constitutional rights in a class action.

Accordingly, the Court hereby enters judgment in favor of the plaintiffs against the defendant, the Commissioner of Public Works of the City of Racine in accordance with the verdict of the jury in the amount of $764,612. The Court further orders that this amount be placed in a fund pending allocation to the parties that it is owed.

The Court having considered all the factors involved in the carrying out of this lawsuit, the difficulty of this case, the enormous time expended in preparing and readying the case, the high degree of skill and work involved in litigating the matter, the great deal of success the plaintiff has enjoyed in this matter, the added responsibility of going forth representing a class of plaintiffs in this action involving a

denial of equal protection of the laws to a portion of the public, allocates that one-third of this fund be paid over to the attorneys for the plaintiff as proper and normal attorney fees.

The Court will order that the plaintiffs' attorneys send out notices or run notices in the newspapers setting out the class requirements to inform potential class members of their right to file claims against the balance of the class action fund.

The Court further orders that Court Commissioner James Drummond be appointed to act for the Court in setting up the above-stated procedures and to hear any disputed claims that may arise. The Court will order a date ninety days from the date of filing of the notices to be set as a final date for the filing of claims and will allow recovery to each party claimant in the amount due them minus the proportional amount of attor-

ney fees.

The Court also orders that compensation for the court commissioner be paid at the rate of $50 per hour and that this compensation be paid out of the fund before any residual amount is turned over to the city. Finally, the Court orders all the claims to be paid in full in the manner stated above, and that if the amount of the fund exceeds the claims, that the rest be turned over to the city. That if the amount of the fund does not meet the levels of the claims, that each claim be reduced proportionately and each claimant receive a reduced proportional share.

Dated December 14, 1982.

BY THE COURT:

/s/ E. J. Vuvunas
Hon. Emmanuel J. Vuvunas
Circuit Judge, Br. IV

SUMMARY OF MOTION HEARING IN CARPENTER CASE

(No. 80-CV-1221)

(Before the Honorable Dennis J. Flynn, August 12, 1982)

"The Court in addressing the motion that's before the Court to decertify the class and in terms of addressing the plaintiff such that it can bring a cause of action on behalf of that class determines that the plaintiff has met its burden of establishing a class."

"In other words, there were 2,065 units of residential buildings which contain five or more dwelling units which were not provided with solid waste collection."

"Because I find that the plaintiff has established its burden of demonstrating both that there is a class and that he is a member of that class and that it would be impracticable to bring all interested parties before the Court, I'm going to deny the motion which is made by the defendant today

for decertification of the class itself."

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED

ORDER

Case No. 80-CV-1221

HENRY CARPENTER, Representative member,

Plaintiff

vs.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN

Defendant

On July 26, 1982, the Plaintiffs appearing by their attorney John Wargo and the Defendant appearing by his attorney

Daniel P. Wright and the Court, the Honorable John C. Ahlgrimm presiding, having heard arguments relating to the Defendant's Motion for Decertification of the Class and of the Class Claim for Money Damages,

IT IS HEREBY ORDERED THAT the Plaintiffs will provide the Defendant with a notice of individual class members not later than August 2, 1982; the Defendant may investigate the eligibility and qualifications of such alleged class members and at 1:00 p.m. on August 12, 1982, a pretrial hearing will be held to consider the class and to consider trial procedure. If the Defendant needs more time to investigate the alleged class members identified, then the trial date will be continued. If the Defendant's investigation discloses questions relating to the number of class members, then the Defendant may renew its Motion to Decertify the Class.

The Defendant's Motion to Decertify the

Class Claim for Money Damages is denied. If either party believes that the rulings and orders made in this matter would require the case to be tried by the undersigned judge, then a request to transfer the matter should be made to Judge Flynn.

Dated this 29th day of July, 1982.

BY THE COURT

/s/ John C. Ahlgrimm
John C. Ahlgrimm

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH HAVE FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED

HENRY CARPENTER, Representative member,

Plaintiffs

vs.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN,

Defendant

MOTION FOR DECERTIFICATION OF CLASS AND OF CLASS CLAIM FOR MONEY DAMAGES

Case No. 80-CV-1221

The Defendant, by his attorneys in the Office of the City Attorney moves the Court to declare the alleged class insufficient on

the grounds that joinder of all members is not impracticable and to decertify that portion of the alleged class members' cause of action which claims monetary damages on behalf of the members of the alleged class. Affidavits are attached hereto in support of this motion.

Dated this 5th day of April, 1982.

CITY OF RACINE

CITY ATTORNEY'S OFFICE

/s/ Daniel P. Wright
Daniel P. Wright
Attorney for Defendant

730 Washington Avenue
Racine, Wisconsin 53403
(414) 636-9115

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH HAVE FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED

HENRY CARPENTER, Representative member,

Plaintiffs

vs.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN,

Defendant

AFFIDAVIT OF ANTHONY J. SCHLAFFER

Case No. 80-CV-1221

STATE OF WISCONSIN)
) ss
COUNTY OF RACINE)

Anthony J. Schlaffer, first being duly

sworn on oath deposes and states as follows:

1. That he is an adult resident of the City of Racine, County of Racine, State of Wisconsin and that he has been the duly appointed City Clerk for the City of Racine since January 1, 1978.

2. That in his capacity as City Clerk he is charged by the Common Council and the laws of the State of Wisconsin as agent for service of process under §893.80(1), Stats.

3. That in his capacity as City Clerk he maintains files of all Notice of Claims asserted against the City of Racine and its officers, officials, agents or employees for acts done in their official capacity.

4. That on December 19, 1979, the affiant was served with a Notice of Claim against the City of Racine relating the specific circumstances of the City failing to pick up garbage at 3234 Northwestern Avenue, Racine, the property of Henry Carpenter.

5. That affiant has not received ser-

vice of and does not have in his files any record of written notice of the circumstances of any claim for damages for failure to pick up garbage from any person other than Henry Carpenter.

Further affiant sayeth not.

Dated this 5th day of April, 1982.

/s/ Anthony J. Schlaffer
Anthony J. Schlaffer

Subscribed and sworn to
before me this 5th day
of April, 1982.

/s/ Karen M. Norton
Notary Public, Racine County, Wis.
My commission (Is)(Expires) 7-31-83

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, November 8, 1983

TO William Binetti
932 Lake Avenue
Racine, WI 53403

Daniel P. Wright
Deputy City Attorney
730 Washington Ave.
Racine, WI 53403

Hon. Emmanuel Vuvunas
730 Wisconsin Avenue
Racine, WI 53403

The Court today announced an order in your case as follows:

No. 83-100 Henry Carpenter, representative member, v. Commissioner of Public Works of the City of Racine

The court having considered plaintiff-respondent-petitioner Carpenter's petition for review of an adverse decision of the court of appeals, district II, dated September 26, 1983,

IT IS ORDERED the petition for review is denied, with $50 costs.

MARILYN L. GRAVES
Clerk of Supreme Court.

SUMMARY OF SHOREHAVEN, A LIMITED PARTNERSHIP, PETITIONER VS. COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, RESPONDENT

(Decided by Honorable Thomas P. Corbett, October 29, 1978.)

"The Commissioner's report, defendant's exhibit A on page 3 sets forth that collection service was being provided to 66% of multiple family units of 5 units or more per building. That 66% is actually 3,543 residential units as set forth on page 7. On the same page it is revealed that the City does not collect from 1,808 such multiple dwelling units."

"The Court accepts the Commissioner's conclusion that arbitrary decisions have been made on collection practices from multiple family units."

"While the ordinance permits the Commissioner to make and publish such additional rules and regulations as may be found necessary for the proper collection, removal and disposal of refuse in the City, there is

no authority in the ordinance that would permit the Commissioner to pick and choose which householders will be served by refuse collection and which will not on the basis that some householders live in new apartment buildings and some in older buildings that have been served for years."

"Resolution no. 760 directed no change in the service now provided apartments. The refusal of the Commissioner of Public Works to authorize and direct the collection of solid waste or refuse, sometimes called garbage, from the householders living in the Shorehaven apartments while such collection service is furnished to householders living in other apartments in the City is arbitrary, capricious and without a natural basis and, therefore, constitutes a violation of the equal protection clause of the 14th amendment of the United States Constitution. Resolution no. 760 in seeking to continue the hereinabove condemned practices is equally unconstitutional."

NOTICE OF CLAIM AGAINST CITY OF RACINE

TO: City of Racine
c/o Anthony J. Schlaffer, City Clerk
Racine, Wisconsin

Pursuant to Wisconsin Statute 895.43, we are hereby informing you that on August 27, 1974 and at all times thereafter, and specifically by an action filed against the Commissioner of Public Works of the City of Racine by Shore Haven, a limited partnership, the City of Racine had actual notice of the claim and any delay in giving notice has not in anyway prejudiced the City of Racine, and that this document shall constitute further notice of said claim and that specifically, the City of Racine was on notice from October 29, 1978 of this claim in that the Honorable Thomas P. Corbett, Judge of the Circuit Court of Racine County, entered an order at that time in the case of Shore Haven, a limited partnership, -vs- the Commissioner of Public Works of the City of Racine, determining that the actions for

which the City had been put on notice as aforesaid were unconstitutional. Claimant herein states as follows:

1. The claimant is Henry Carpenter who resides at 4183 Highway K, Franksville, Wisconsin and who is the owner of an eight unit apartment building at 3234 Northwestern Avenue, Racine, Wisconsin and Henry Carpenter, as a member of a class of parties having apartment buildings of five units or more, which addresses are known to the City of Racine and which addresses are not known to claimant.

2. That pursuant to prior litigation based on the statements of the Commissioner of Public Works and others, the Commissioner of Public Works has indicated that 3,542 residential units of five units or more per building do obtain the pickup of their garbage and the 1,808 do not have their garbage picked up and that subsequently the Commissioner of Public Works has indicated

that 70% of five unit or more per building apartments do not have their garbage but that 30% of such units do have their garbage picked up.

3. That claimant herein personally and as a member of said class and for and in behalf of the class, allege that said action by the Commissioner of Public Works constitutes a violation of his constitutional rights and the constitutional rights of each and every member of the class of parties owning multiple family units of five or more per building, in that it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the comparable clause of the Wisconsin Constitution and that failure to pick up the garbage of any householder in the City of Racine, whether they reside in a, or own a, household of five units or more constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment of the United

States Constitution and the comparable clause of the Wisconsin Constitution.

4. That the appropriate relief sought is that the City of Racine, Commissioner of Public Works cease and desist from said practice and herein undertake the pickup of all garbage from all household residential units, whether they be five family units per building or more, or less and that relief is further sought for Henry Carpenter together with all other members of the class of payment to each and every member of the class and to Henry Carpenter for all sums paid for private collection of garbage since the City of Racine was first put on notice by virtue of the action in Shore Haven, a limited partnership, -vs- the Commissioner of Public Works, dated August 27, 1974 or in the alternative from the date of the Court decision by Judge Thomas P. Corbett, dated the 29th day of October, 1978.

5. That claimant herein requests the

Commissioner of Public Works of the City of Racine to deposit the sum of $1,179,675.00 with Henry Carpenter, personally and as a member of a class of parties having apartment buildings with five or more units who have not received collection and removal of refuse and that said parties may proceed to establish their claim proportionately to said amount less the cost of administration and attorney fees.

6. Claimant herein indicates for himself, personally and for all members of the aforesaid class, that they are all property tax payers in the City of Racine and are entitled to equal protection of the laws.

7. That said claim is made against the Commissioner of Public Works of the City of Racine and the City of Racine, a municipal corporation, and that said claim is not a Court claim specifically requiring notice.

Dated this 14 day of December , 1979.

HAND & QUINN, S.C.

By /s/ Matthew H. Quinn
Matthew H. Quinn - President
Attorneys for Henry Carpenter

HAND & QUINN, S.C.
Attorneys at Law
932 Lake Avenue
Racine, WI 53403